FILED
JUN 29 1995
OFFICE OF THE CLERK

No. 94-1958

(2)

In The

Supreme Court of the United States

October Term, 1994

WAL-MART STORES, INC.
d/b/a SAM'S WHOLESALE CLUB and/or
SAM'S WHOLESALE CLUB, a Division of
WAL-MART STORES, INC.,

Petitioner,

v.

KENT ANDREW FOLLETTE and JANE
ELIZABETH FOLLETTE, Individually and
as Next Friend of ANDREW STEPHENSON
FOLLETTE, a Minor Child,

Respondents.

**On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Eighth Circuit**

RESPONDENTS' BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

In a lawsuit filed in Arkansas district court, the Eighth Circuit refused to apply *res judicata* to bar Respondents' Uniform Commercial Code (UCC) breach-of-warranty action. Respondents' breach-of-warranty claims could not have been brought in the earlier Louisiana lawsuit since Louisiana has not adopted Article 2 of the UCC. In so holding, the Eighth Circuit applied a Louisiana statute, La. Rev. Stat. Ann. § 13:4232, which permits a second action by a plaintiff if "exceptional circumstances" justify relief from the effects of *res judicata*. The Eighth Circuit found that, because "exceptional circumstances" were created by the very unusual procedural facts of this case, Respondents were not barred from pursuing their Arkansas breach-of-warranty suit.

Does the Eighth Circuit's choice-of-law decision to apply a Louisiana *res judicata* statute create an intercircuit conflict or provide any other reason to grant certiorari?

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STATEMENT OF THE CASE

An accurate statement of the case and proceedings below is reported in the opinions of the Eighth Circuit (Petition for Writ of Certiorari App. 1a-8a; 33a-36a) *Follette v. Wal-Mart Stores, Inc.*, 41 F.3d 1234 *reh'g granted* 47 F.3d 311.

REASONS FOR DENYING WRIT

The Eighth Circuit explained its choice-of-law decision regarding the doctrine of *res judicata* as follows:

> When a federal court is sitting in diversity, the preclusive effect of a prior judgment is determined by the preclusion rules of the forum which provided the substantive law underlying that prior judgment. *Hicks v. O'Meara*, 31 F.3d 744, 746 (8th Cir. 1994). This rule applies when the original judgment is that of another federal court sitting in diversity. *Austin v. Super Valu Stores*, 31 F.3d 615, 617-18 (1994).

See Petition for Writ of Certiorari, App. 5a.

This proposition originates by authority of the Full Faith and Credit Clause of the United States Constitution, U.S. Const. Art. IV § 1, and its statutory complement, 28 U.S.C. § 1738. These provisions require that federal courts sitting in diversity lend prior diversity judgments of other federal courts the same full faith and credit as would exist between two state courts. In such situations, state, not federal, law dictates the outcome. *Semler v. Psychiatric Institutes of Washington D.C. Inc.*, 575 F.2d 922 (D.C. Cir. 1978).

Petitioners suggest that the decisions of the Eighth Circuit complicate and confuse an already conflicting jumble of views. They define two emerging lines of cases, one group forming a majority rule, which obliges federal courts to apply only federal law on *res judicata* matters, *Kern v. Hettinger,* 303 F.2d 333 (2d Cir. 1962), and a minority rule mandating that a federal court sitting in diversity look to the *res judicata* law of the state where it sits for guidance, *Gramm v. Lincoln,* 257 F.2d 250 (9th Cir. 1958). Petitioners contend the Eighth Circuit decisions are out of step with both majority and minority rules thereby making new law where none existed. See Petition for a Writ of Certiorari, at 11-13. Actually, the Eighth Circuit's decisions track a long line of cases employing state law from the first forum to determine the *res judicata* effects of an earlier diversity judgment. *Gatzemeyer v. Vogel,* 589 F.2d 360, 362 (8th Cir. 1978); *Wilson v. Retail Credit Co.,* 474 F.2d 1260 (5th Cir. 1973); *Hayles v. Randall Motor Co.,* 455 F.2d 169, 173 (10th Cir. 1971); *Provident Tradesmens Bank & Trust Co. v. Lumbermens Mut. Cas. Co.,* 411 F.2d 88, 94-95 (3d Cir. 1969) (preclusion within the course of a single diversity action); *Makarim v. Rinard,* 336 F.2d 333, 334 (3d Cir. 1964); *Rust v. First National Bank,* 466 F. Supp. 135, 138 (D. Wyo. 1979); *Skrzat v. Ford Motor Co.,* 389 F. Supp. 753 (D.R.I. 1975); *Forrester v. Southern Ry.,* 268 F. Supp. 194, 195-196 (D.C. Ga. 1967).

Nevertheless, a number of circuits have announced that federal *res judicata* principles rather than state law be applied as a choice of law. However, evaluation of the circumstances behind these divergent opinions generally reflects the existence of *an overriding federal interest. Semler* provides clarity to these apparently dissimilar decisions:

> [W]e believe that the principles of Erie * * * and the mandate of the Full Faith and Credit Clause as supplemented by 28 U.S.C. § 1738 require a federal court exercising diversity jurisdiction in forum II to give to the judgment of a federal court exercising diversity jurisdiction in forum I the same full faith and credit that a state court in forum II would be obliged to give the judgment of a state court in forum I, *at least in the absence of an overriding federal interest.*

575 F.2d at 927-928 (emphasis added).

Put another way, *if there is an overriding federal interest,* federal principles will apply notwithstanding the *Erie* doctrine, the Full Faith and Credit Clause and 28 U.S.C. § 1738. However, when no overriding federal interest exists, state law should control. Consideration of the various leading cases supports this conclusion.

The majority viewpoint is based primarily upon the opinion in *Kern v. Hettinger.* This prototype case involved the *res judicata* effect of a Fed.R.Civ.P. 41(b) want-of-prosecution dismissal. Thus, the integrity of the Federal Rules of Civil Procedure was at stake. Not surprisingly, the Court abandoned any notions of state law and federal rules of *res judicata* were applied. The *Kern* Court stated its concerns:

> *It would be destructive of the basic principles of the Federal Rules of Civil Procedure* to say that the effect of a judgment of a federal court was governed by the law of the state where the court sits simply because the source of federal jurisdiction is diversity. * * * [W]e think it would be strange doctrine to allow a state to nullify the judgments of federal courts constitutionally established

> and given power also to enforce state created rights.

303 F.2d at 340 (emphasis added).

In another leading and oft-cited case, *Aerojet-General v. Askew*, 511 F.2d 710 (5th Cir. 1975) *cert. denied* 423 U.S. 908 (1975), evidence of collusive conduct jeopardized the power of a prior federal court judgment. The Fifth Circuit, in its opinion, favorably cited the *Kern* decision and followed federal principles of *res judicata*. *Aerojet-General*, however, involved an attack upon a prior federal court order directing specific performance of a land sale contract by state officials, raising a serious federal question. The court recognized the necessity, in such cases, of protecting federal diversity judgments and fending off collusive conduct which might circumvent federal judicial power. A revealing aspect of *Aerojet-General* was the rather direct threat posed to the court's injunctive powers which, in turn, triggered the action of the court. Therein, the Court reasoned, "*nullification of a federal court judgment* would be precisely the result in this case if, as Dade County urges, the District Court had been obliged to follow state law to decide the question of res judicata." 511 F.2d at 716 (emphasis added).

Similarly, other cases have recognized this principle either explicitly or implicitly. For example, in *Southwest Airlines Co. v. Texas Intern. Airlines*, 546 F.2d 84 (5th Cir.1977) *cert. denied* 434 U.S. 832, the Fifth Circuit stated:

> Federal law of *res judicata* controls this case. Even though the holding of Southwest I relied on state law, *the effect of the case on parties and nonparties presents a question of federal law distinct from the local issues decided.*

546 F.2d at 94 (emphasis added). Likewise, in *Williams v. Ocean Transport Lines, Inc.*, 425 F.2d 1183 (3d Cir. 1970), the Court stated:

> *Where so substantial a federal interest is involved* as the multiplicity of claims arising out of seamen's and long-shoremen's accidents, a federal court should be able to decide for itself whether or not a greater preclusionary effect may be given to a prior judgment than would be given in the state of the first forum.

425 F.2d at 1189-1190 (emphasis added).

Once again an overriding federal interest influenced the choice-of-law decision. Federal issues of law arose which were distinct from the state legal issues. This factor predictably governed the court's choice-of-law holding. Evidence of similar federal interests permeate those decisions supporting the majority rule.

The so-called minority rule of the Ninth Circuit advocates reliance upon state law of the *second* forum. *Gramm v. Lincoln*, 257 F.2d 250, 255 & n. 6 (9th Cir. 1958); *Bates v. Union Oil Co.*, 944 F.2d 647, 649 (9th Cir. 1991); *Washington Public Power Supply v. Pittsburgh-Des Moines Corp.*, 876 F.2d 690, 699 (9th Cir. 1989). In each of these cases, however, both courts, first and second, were located in the same state, therefore only one forum's law came into play. Regardless, the willingness of the Ninth Circuit to also rely upon state law suggests that, absent a particular threat to the independence of the federal judicial system, state *res judicata* law, derived from the second forum, presents an acceptable and convenient choice of law.

Federal treatises discuss the seemingly perplexing and confusing differences between the circuits. See 18 Wright, Miller & Cooper, Federal Practice & Procedure § 4472 (1981 & Supp. 1994); 1A Moore's Federal Practice § 0.311[2]. Indeed, varying views appear as each of the circuit courts of appeal proclaim choice-of-law decisions on *res judicata* matters. However, careful examination of the facts and circumstances underlying these cases such as *Kern*, *Aerojet-General* and their progeny, reveal the development of a more practical proposition. If an overriding federal interest presents itself – such as a threat to the Federal Rules of Civil Procedure, or a purely federal question, or an attack upon the inherent power of the federal court system – then the second federal forum is justified, and frequently does apply federal law as a measure of judicial self-defense. Even the Eighth Circuit has supplied appropriate federal *res judicata* law in such situations. *Poe v. John Deere Co.*, 695 F.2d 1103, 1105 (8th Cir. 1982). On the other hand, when no federal interest appears and no threat is posed, a federal court sitting in diversity assumes its role as an adjunct to the state court system, *Sherrill v. McShan*, 356 F.2d 607 (9th Cir. 1966); *see also Guaranty Trust Co. v. New York*, 326 U.S. 99 (1945), and routinely applies state law without controversy. See *Gatzemeyer, supra; cf. Hanna v. Plummer*, 380 U.S. 460 (1965). It might even be argued that applying federal law includes the right of each circuit, if necessary, to draw upon appropriate state law to resolve *res judicata* issues. See *Williams, supra*. This makes sense, particularly in diversity suits of a routine nature that have little or no impact on federal courts or their procedure. Consequently, the conflict as presented here is not really of such importance as to warrant certiorari review.

In any case, the facts underlying this particular decision do not portray an overriding federal interest. Both the Louisiana lawsuit and the second Arkansas action might just as easily have been brought in state court as purely state actions. Diversity of citizenship formed the sole foundation for federal jurisdiction in both cases. Certainly, no threat to an "independent federal judiciary" was detected by the Eighth Circuit. In using Louisiana preclusion law to resolve the issue at hand, the Eighth Circuit simply recognized the practicality of applying state law when no federal interest was involved. *Lane v. Sullivan,* 900 F.2d 1247, 1250 (8th Cir.), *cert. denied* 498 U.S. 847 (1990). In so doing, they achieved a just result consistent with both Louisiana law and federal principles. *Lane v. Peterson,* 899 F.2d 737 (8th Cir.) *cert. denied* 498 U.S. 823 (1990).

Moreover, there exist several practical reasons why this case would be inappropriate for resolving an intercircuit conflict: (1) the peculiar facts of this case do not pose a recurring judicial problem; (2) the *res judicata* law of Louisiana embodied in La. Rev. Stat. Ann. §§ 13:4231, 13:4232 constitute civil *res judicata,* which is different from common law *res judicata* as found in most other states; and finally, (3) the same result would obtain even if federal principles of *res judicata* were used.

First, the peculiar procedural facts of this case are not reasonably capable of repetition. The Eighth Circuit characterized the Follettes' situation as an "odd and complicated series of procedural events" resulting in a "bizarre

predicament." See *Follette, supra.* Because of the case's factual posture, the likelihood of such facts recurring is virtually nil. A recurring problem would, of course, justify a grant of certiorari review, *Glus v. Brooklyn*, 359 U.S. 231 (1959). *Follette* is not such a case.

Second, La. Rev. Stat. Ann. §§ 13:4231, 13:4232 represent civil *res judicata* which is a different concept than the common law variety of *res judicata* found in most jurisdictions. *Welch v. Crown Zellerbach Corp.*, 359 So.2d 154, 156 (La. 1978). As such, this Court in granting certiorari would be evaluating statutory and arguably substantive law of Louisiana. This fact creates unique analytical problems in fashioning a broad decision applicable to common law jurisdictions.

Lastly, the same result would issue even under accepted principles of *res judicata.* See *Lane v. Petersen, supra.* The *Follette* court noted that the Eighth Circuit has previously applied general principles of *res judicata,* including the Restatement of Judgments 2d. The Restatement of Judgments 2d § 26(1)(c) provides an exception to the general rule of preclusion:

> The *plaintiff was unable to rely on a certain theory* of the case or to seek a certain remedy or form of relief in the first action *because of the limitations on the subject matter jurisdiction of the courts* or restrictions on their authority to entertain multiple theories or demands for multiple remedies or forms of relief in a single action, and the plaintiff desires in the second action to rely on that theory or to seek that remedy or form of relief.

Here, the Follettes in their Louisiana lawsuit were prevented from advancing a UCC claim because Louisiana has not adopted Article 2 of the Uniform Commercial Code and does not provide an equivalent remedy. *Jones v. Menard,* 559 F.2d 1282 (5th Cir. 1977). Under general principles of *res judicata* a plaintiff who could not have brought an action or was prevented from relying upon a certain theory in his first action may be permitted to split his claim and maintain a second lawsuit. *Howard v. Green,* 555 F.2d 737 (8th Cir. 1977). Hence, using accepted *res judicata* principles, the Follettes would be allowed to pursue their UCC claim.

In summary and for each of these additional reasons, this case simply does not provide appropriate circumstances for certiorari review.

CONCLUSION

Res judicata is a sound doctrine and is in no danger of being thwarted through the application of state law to successive diversity suits, particularly as in this case. Indeed, *res judicata* will continue to be a useful and strong doctrine even in the face of an occasional and just exception to the general rule against claim preclusion. Accordingly, the decision of the Eighth Circuit and the facts of this case do not create a conflict with decisions of other circuit courts of appeals as to justify certiorari review

by this Court. Respondents request that this Petition for a Writ of Certiorari be denied.

Respectfully submitted,

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